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IN THE
Supreme Court of the United States

ROBERT E. GOLDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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STATEMENT

The Solicitor General's extraordinarily lengthy Brief in Opposition protests too much. It also persists in the fundamental error committed by the court of appeals. Rather than examine the transcript which is the verified record of the proceedings and which demonstrates that Mr. Goldman made no statements and engaged in no conduct that actually violated Judge Wilson's order not to "argue objections," the Solicitor General relies on Judge Wilson's barrage of

inaccurate and intemperate characterizations of Mr. Goldman's statements. There were, to be sure, "escalating warnings from the court" (Br. in Opp. at 3), "no fewer than 19 admonitions from the court" (*id.*), "repeated admonishments to petitioner" (*id.* at 4), and multiple "admonitions and warnings" (*id.*). But what Mr. Goldman actually said (*see* Pet. at 5-10) did not justify these outbursts from the trial judge. It is, therefore, wholly erroneous to infer from the judge's repeated and baseless attacks on the petitioner -- motivated by sheer personal hostility -- that the petitioner actually "persistently disregarded" the judge's orders (Br. in Opp. at 3), "repeatedly argued objections" (*id.*), "repeatedly violated the court's orders" (*id.*), or that he "violated other district court orders and instructions in numerous other instances" (*id.* at 4).

In addition to being a gross miscarriage of justice, the decision of the Ninth Circuit presents significant legal issues of importance to the administration of justice in the federal courts. This Court should grant certiorari to decide these questions and to prevent any recurrence of such injudicious and intemperate behavior by a district judge.

I.

THE SOLICITOR GENERAL ACKNOWLEDGES A CONFLICT AMONG THE CIRCUITS THAT THE NINTH CIRCUIT DELIBERATELY CONCEALED

We noted in our Petition for Certiorari that the Ninth Circuit's affirmance of the ruling that Judge Wilson was not disqualified under Rule 42(b) conflicted with decisions of the First, Fourth, Seventh and D.C. Circuits. *See* Pet. at 15. The Solicitor General acknowledges that we argued to the Ninth Circuit that Judge Wilson had to be disqualified under Rule 42(b). Br. in Opp. at 10, n.7 ("Petitioner did raise his

argument under Rule 42(b) in the court of appeals.") The Solicitor General also agrees with us that other Circuits have interpreted Rule 42(b) to require disqualification beyond those instances covered by the Due Process Clause. The only reason why there is not a conflict warranting certiorari, according to the Solicitor General, is the remarkable proposition that the Ninth Circuit deliberately chose to conceal this legal issue in its opinion (Br. in Opp. at 10):

> In its per curiam opinion, the court of appeals did not address petitioner's argument that Judge Wilson should have been disqualified under Rule 42(b). . . . Rather, the court of appeals limited its analysis to petitioner's claim that due process required Judge Wilson's disqualification. . . . Because the opinion here does not explicitly address Rule 42(b), it does not conflict with the decisions of any other court on the proper interpretation of that rule, and does not warrant the Court's review of any issue arising under that rule.

In other words, courts of appeals are henceforth free to ignore conflicting legal rulings in other Circuits regardless of how fully the issue is presented to them, and they need not anticipate that this Court will grant certiorari and decide a divisive legal issue so long as the court of appeals is sufficiently machiavellian to avoid any explicit reference to the legal issue that divides the Circuits. That is not tolerable under a rule of law. The standards for disqualification under Rule 42(b) were argued to the Ninth Circuit, and its decision in this case misapplies those standards under legal principles articulated by four other Circuits. Whether or not the Ninth Circuit chose to discuss the issue, its current interpretation of Rule 42(b) -- as manifested in this case -- sets a different standard for a trial judge's disqualification in the Ninth Circuit than in four Circuits comprising twelve States of the Union and the District of Columbia. That conflict is a sufficient reason to grant certiorari.

II.

THE UNCONSTITUTIONAL PROCEDURE BY WHICH PETITIONER'S GUILT WAS DETERMINED WAS NOT VITIATED BY SUPERFICIAL FORMALITIES OF FAIRNESS

Mr. Goldman's guilt or innocence was determined by the same person who, *sua sponte*, filed the formal allegation charging him with having violated his orders 52 times. In addition, the judge was the prosecutor at Mr. Goldman's trial because, as the Solicitor General notes, "the government did not participate." Br. in Opp. at 6, n.4. The Solicitor General tries to soften the obvious unfairness of such an imbalanced procedure by declaring that Judge Wilson harbored no "personal animosity" towards Mr. Goldman because Mr. Goldman's conduct was not as outrageous and personally offensive as the conduct of the lawyers or defendants involved in *Offutt v. United States*, 348 U.S. 11 (1954), *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), and *Taylor v. Hayes*, 418 U.S. 488 (1974). *See* Br. in Opp. at 17-19.

The anomaly of the Solicitor General's argument is that a lawyer like Mr. Goldman, who maintains an attitude of respect vis-à-vis a trial judge who subjects him to unfair criticism throughout a trial and also ultimately cites him for contempt, is subjected to trial and punishment by the judge who is his accuser, whereas the totally disrespectful lawyer is entitled to a fair and disinterested fact finder. Moreover, the distinction made by the Solicitor General renders trial by Judge Wilson more unfair, not less. The central issue for the finder of fact was whether Mr. Goldman had engaged in contemptuous conduct or whether he had tried to obey the court's orders while carrying out his obligation to his client. That was hardly a debatable issue in *Offutt*, *Mayberry* and *Taylor* in light of the words that the attorneys in those cases had actually employed. But it was a different question in

this case where what Mr. Goldman said was not disrespectful. Because Judge Wilson was not disqualified, that critical decision was made not by a neutral fact-finder but by Mr. Goldman's accuser.

The Solicitor General declares that Mr. Goldman was accorded "a full and fair hearing" on the contempt charge and had notice, the right to counsel, and the right to present witnesses and evidence. Br. in Opp. at 18. Although this gave the appearance of fairness, Judge Wilson's verdict -- after a recess that lasted not more than ten minutes -- that Mr. Goldman had deliberately committed all the specifications of contempt with which he was charged proved that the hearing was a sham. Judge Wilson's explanation for rejecting totally the detailed testimony of Mr. Goldman and his young trial associate -- "You weren't here. I was" -- demonstrated the unfairness of the judge's being accuser and trier-of-fact at the same time.*

Most extraordinary is the Solicitor General's additional proof that the proceeding against Mr. Goldman was fair and not biased -- i.e., that when he decided, after the contempt trial was over, to charge Mr. Goldman with contempt under Section 401(3), so that actual obstruction-of-justice would not have to be proved, Judge Wilson "gave petitioner the opportunity for supplemental briefing on the matter." Br. in Opp. at 19. In fact, Mr. Goldman's counsel was obliged affirmatively to seek such an opportunity; the judge's initial order did not invite briefs. Moreover, the extraordinary step of altering the charge after Mr. Goldman's trial so that it should be easier to convict the accused proves that the judge was intent on justifying his precipitous determination of guilt rather than arriving at a fair and impartial verdict.

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* Indeed, Mr. Goldman's counsel requested prior to the hearing that Judge Wilson take the stand and be subjected to cross-examination. The judge denied that request.

III.

IN ORDER TO ENABLE TRIAL LAWYERS TO REPRESENT THEIR CLIENTS ZEALOUSLY, ACTUAL OBSTRUCTION OF JUSTICE MUST BE ESTABLISHED FOR ANY IN-COURT CONTEMPT, WHETHER TRIED SUMMARILY OR ON NOTICE

In our Petition for Certiorari we quoted this Court's holding in *In re McConnell*, 370 U.S. 230, 236 (1962), that a lawyer's in-court conduct "cannot amount to a contempt of court" unless it "create[s] an obstruction which blocks the judge in the performance of his judicial duty." Pet. at 18-19. The Solicitor General erroneously seeks to limit this rule to summary contempt proceedings or to contempts brought under Section 401(1)

But the reasoning that underlies the holding in *McConnell* -- further amplified in *In re Little*, 404 U.S. 553, 555 (1972) -- bears no relation to whether the proceeding being conducted against the trial attorney is summary or plenary. A trial lawyer must know that he has latitude to engage in conduct that is "persistent, vociferous, contentious and imposing, even to the point of appearing obnoxious" (*In re Dellinger*, 461 F.2d 289, 400 (7th Cir. (1972)) in order to enable him to represent his client properly. It would be a meaningless assurance if he could be held in contempt for such zealous advocacy in a non-summary proceeding or under Section 401(3).

The Solicitor General and the Ninth Circuit rely on the absence of any language in Section 401(3) that limits prosecution to a case in which allegedly contemptuous conduct obstructs the administration of justice. *See* Br. in Opp. at 21; Pet. App. at 9a-10a. Because of this omission -- apparently noticed belatedly by Judge Wilson -- the district

judge amended his contempt citation after the trial and ultimately held (1) that Section 401(3) applied to courtroom conduct by a trial lawyer (Pet. App. at 44a-47a) and (2) that a trial lawyer could be guilty of contempt under Section 401(3) for statements and conduct in the courtroom without proof of actual obstruction of justice (Pet. App. at 47a-51a).

Whether the constitutional policies articulated in this Court's *McConnell* and *Little* opinions can be evaded by prosecuting a lawyer on notice for contempt under Rule 42(b) and under Section 401(3) is an important issue that this Court should resolve. As the *amicus curiae* brief of the National Association of Criminal Defense Lawyers and the Washington Association of Criminal Defense Lawyers supporting our petition for certiorari states, "[S]tandards for sanctionable misconduct [must] be clearly defined in a way that does not limit or chill a vigorous and zealous defense in federal criminal cases." Brief of *Amicus Curiae*, at 3. And the *amicus* concluded, on its review of the record, that what Mr. Goldman did in the courtroom in this case was not contemptuous at all but "should be considered good lawyering." *Id.* at 10.

In short, this case is not one in which a lawyer has "willfully and flagrantly def[ied] a court's direct orders in the name of zealous courtroom advocacy" as the Solicitor General suggests. Br. in Opp. at 22. The primary effect of affirming Mr. Goldman's contempt conviction, as the Ninth Circuit did, is to notify all lawyers who try cases in federal courts in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Washington that great zeal in representing their clients and preserving the client's rights during a trial may result in a contempt sanction and a prison term.

CONCLUSION

For the foregoing reasons and those set forth in our Petition for Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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